No. 2569

# In The United States Circuit Court of Appeals for the Ninth Circuit

HOWARD D. THOMAS COMPANY, a Corporation,
*Petitioner,*

v.

WM. H. BEHARRELL, WM. C. ALVORD, and ELLIOTT CORBETT, as Trustees in Bankruptcy of the Estate of I. Gevurtz & Sons, Bankrupt,
*Respondents.*

In the Matter of I. GEVURTZ & SONS, Bankrupt.

## Respondents' Brief on Petition for Revision

Under Sec. 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Oregon.

MESSRS. BEACH, SIMON & NELSON,
*Solicitors for Petitioner.*

MESSRS. REED & BELL,
*Solicitors for Respondents.*



GREENBAY PRINTING COMPANY

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### STATEMENT OF THE CASE.

In September, 1913, the petitioner Howard D. Thomas Co., a corporation, organized under the laws of Washington, filed a claim in bankruptcy with the trustees of I. Gevurtz & Sons, a corporation, bankrupt. The petitioner had sold rugs to I. Gevurtz & Sons in the sum of $3906.36 (Record, p. 4), and as I. Gevurtz & Sons were about to file their petition in bankrupty, and with knowledge thereof (Record, p. 9) petitioner took back from I. Gevurtz & Sons

rugs to the value of $2911.60 (Record, p. 4), and a claim was filed for the balance of $996.26. This was a claim in bankruptcy.

Objections were filed to this claim by the trustees on the ground that the petitioner had received a preference in the shape of said returned rugs (Record, p. 4) and had not surrendered the same.

After the testimony had been taken and briefs filed (pp. 26-28) on these objections before the referee in bankruptcy (Record, pp. 4 and 5) the petitioner asked permission to withdraw its said claim, which permission was granted (Record, p. 5). There is no showing that the claim was withdrawn and there is no order in the record ordering the withdrawal of the claim.

The petitioner thereupon filed in the court below a petition to rescind the sale (Record, pp. 2 to 5). An answer was filed to this petition by the trustees. This answer was not included in the record sent up from the court below, but the same is found in the answer to the petition in this court on pages 24 to 29 of the printed record ending with the words "Wherefore the trustees pray for an order of this court dismissing said petition to liquidate said claim."

Thus in the court below there was filed a petition to rescind the sale and the answer thereto. In other words, the petitioner initiated a controversy in bankruptcy proceedings similar to an action in replevin for the goods.

Upon the issues raised by the petition and answer a trial was had before the special master (p. 6). The master filed findings of fact and conclusions of law (Record, p. 7). The findings of the special master were to the effect that the petition of Howard D. Thomas Company be denied.

Exceptions to the report of the referee were presented and argued to the court below (Record, p. 14).

The court below made a decree as follows, omitting the recitals: "In consideration whereof, it is ordered and adjudged that the findings of the said special master be and the same are hereby affirmed, and that the petition of said Howard D. Thomas Co. to liquidate their said claim be and the same is hereby denied."

The petitioner thereupon presented to this court its petition to revise, under section 24b of the Act. To this petition to revise the trustees filed in this court an answer with a prayer to dismiss, which answer and motion to dismiss sets forth the answer of the trustees in the court below (omitted from the record as aforesaid) and denies the matter set forth by the petitioner in its paragraphs one and two of the prayer of its Petition to Revise, on page 15 of the printed record, which paragraphs one and two seem to be conclusions of fact erroneously deduced by the petitioner.

## PETITION TO REVISE DOES NOT LIE.

The trustees and respondents are of the opinion that a Petition to Revise does not lie in this matter.

The facts above set forth and which can be gathered from different statements in the record show that this is in reality a controversy begun by a business house seeking a remedy similar to replevin of goods, claimed by the trustees on behalf of the other creditors to have been sold and delivered, which sale the petitioner claims was a fraudulent sale, therefore subject to rescission. The trustees submit that this is a controversy taken in bankruptcy proceedings which the appellate court can hear only on appeal. In fact, it appears from the brief of the petitioner that this is a plenary suit. The petitioner insists on its right to reclaim and rescind. On page 7 the petitioner states that it rests its right to reclaim upon a particular false statement of material fact, and again on page 21 of its brief says: "Thomas & Company thereafter filed its petition for leave to liquidate its claim, which petition is in effect a petition for rescission or reclamation."

The petition of the petitioner in the court below was to rescind the sale on the ground of fraud. Their petition specifically says: "It became, was and is entitled to rescind the sale thus fraudulently procured and reclaim its rugs with damage for such as cannot be returned." This was denied by the court below, not only on the ground that the petitioner had confirmed the sale by filing its claim in bankruptcy for the total amount without offering to return the preference, but also on the ground that in any event the facts did not justify a rescission of the sale. The petitioner endeavors to have the order

of the court below brought here under section 24b for revision, and as above indicated, the trustees submit that this is a plenary suit and can be and should be brought up only on appeal. That this is so can be gathered from a consideration of conditions that would have existed if the court below had granted the exceptions to the report of the special master and had reversed the special master and had made findings of fact contrary to those of the master. To have then brought the controversy to this court, an *appeal* would have been clearly necessary. The testimony would have been necessary, and the exhibits, and being so under those conditions, it is true under the present conditions. Moreover the remedies are exclusive, as hereinafter further pointed out. Where there is an appeal the Petition to Revise does not lie.

It is the understanding of respondents that section 24b was intended to provide in bankruptcy proceedings a summary and methodical manner by which the bankruptcy practice and proceedings can be regulated in the inferior courts by the appellate court. Section 24b does not seem in itself reasonably to support the view that it can be used to present controversies over property on appeal between litigants.

The bankruptcy act gives every opportunity for appeal, rehearing and review of the decisions of the court below in litigated matters by sections other than 24b, whereby matters involving the rights of parties to property can be presented on the law, or

the facts, or both, to the appellate courts, and by methods which are much more certain and satisfactory to litigants than by petitions to revise. The present case before this court furnishes an illustration. Here the petitioner asks to bring up a question of the fraudulent sale of property, in effect replevin, together with the question of waiver and election, and the record is in such shape, under the Petition to Revise, as to necessitate considerable research to discover what the petitioner is endeavoring to present to this court—whether it is depending upon questions of law, or is trying to inject questions of fact into the proceedings to be revised under section 24b.

This cause should be heard in the appellate court only upon an appeal, for a litigant is not responsible for the form of findings filed by a referee in bankruptcy or of a special master, and in the event such findings are criticised the litigant ought to have a chance to have presented to the court the evidence on which the findings are based to support its claim or substantiate the findings. Moreover, findings are not even required in this case on an appeal.

The respondents submit that in the absence of the exhibits and testimony taken at the hearing before the special master this court is in no position to touch upon the facts, or in any way to overrule, change or modify the decree of the court below.

In the prayer of the petitioner in this court, on page 15, of the record, are the two paragraphs above referred to, whereby the petitioner injects into the

record its own conclusion of law and fact as findings of the referee of the court below. In order to meet this the trustees have filed an answer in this, the appellate court, denying these paragraphs and the alleged findings and conclusions therein erroneously stated.

This certainly is unsatisfactory practice in an appellate court, but is necessitated by the steps taken by the petitioners. In an appeal or method otherwise provided for the decision of controversies in the appellate court by the bankruptcy act, such a condition could not arise.

It would seem that in an appeal or in any proceeding taking to the appellate court a matter involving property rights, or a controversy in bankruptcy proceedings over property rights, the law will not contemplate allowing one party to formulate by petition, or by any act of his own in the appellate court, a new state of facts, and it is for this reason that it can be said that section 24b was intended to cover only matters of proceeding and practice in bankruptcy matters, for in such cases the petition would naturally and inherently be limited to facts made or done by the acts of the court below.

In the many references to section 24b by the courts this view seems to be the one finally evolved.

*In re H. H. Loving, Trustee,* 224 U. S. 188, (56 Lawyers Ed. 726), the court says:

> "The question now propounded is: Was the trustee also entitled to a review in the circuit court of appeals, under section 24b, by petition

for review? Under that section authority, either interlocutory or final, is given to the circuit court of appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the circuit court of appeals, and, in certain cases, in this court. The proceeding under section 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under section 25. *Coder v. Arts, supra,* p. 233. Under section 24b a question of law only is taken to the circuit court of appeals; under the appeal section, controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b. The object of section 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate.

"In our judgment the rule was well stated *in re Mueller,* 68 C. C. A. 349, 135 Fed. 711, by Mr. Justice Lurton, then circuit judge (p. 715):

" 'The proceedings reviewable (under section 24b) are those administrative orders and de-

crees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under section 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under section 24a.'

"We answer the question certified in the negative."

We have found no later decisions than this, except

*Houghton v. Burden,* 228 U. S. 165 (57 Lawyers Ed. 782),

decided in 1913, in which the court says:

"But the district court is by section 2 of the bankrupt act of 1898 (30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1491), when sitting as a bankrupt court given jurisdiction in law and equity for the purpose of collecting and distriubting the estate of a bankrupt, and for the purpose of determining controversies relating thereto, except as otherwise provided. The exception has no application here, as Burden voluntarily came into the bankrupt proceeding and submitted his claim to the adjudication of the bankrupt court. Such an intervention for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee is an intervention in equity, and a decree is reviewable by appeal to the circuit court of appeals in the exercise of its general appellate powers in equity cases under section 24a of the bankrupt act. Loveland, Bankr., 4th ed.,

sections 826 to 829; *Hewit v. Berlin Mach. Works,* 194 U. S. 296, 300, 48 L. Ed. 986, 987, 24 Sup. Ct. Rep. 690; *Knapp v. Milwaukee Trust Co.,* 216 U. S. 545, 54 L. Ed. 610, 30 Sup. Ct. Rep. 412. Upon such an appeal the law and the facts are open for reconsideration, and from the decree of the circuit court of appeals, it not being final (Sec. 128, new Judicial Code, 36 Stat. at L. 1133, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 193), an appeal may be taken under section 241 of the same code."

Earlier decisions from which the rule announced by the Supreme Court may be drawn touch upon the question.

*In re Mueller,* 135 Fed. 712 *et seq.* 6 Circuit 1905.

Remedy by petition for revision, section 24b, and that by an appeal are mutually exclusive.

*Kirsner v. Taliaferro,* 202 Fed. 54, 4 Circuit 1912.

The presentation for allowance of a demand against a bankrupt estate is a step in bankruptcy proceedings as to which an appeal is specially provided by section 25.

*In re Hartzell,* 209 Fed. 776, 8 Circuit 1913.

Where the order and judgment complained of resulted from the consideration of disputed fact and depended upon the findings made thereon, the proper remedy is in an appeal under section 24a.

*Wells v. Sharp,* 208 Fed. 400, 8 Circuit 1913.

See also *Streator Metal Stamp Co.*, 205 Fed. 281, 7 Circuit 1913.

In any event it is pointed out that the petition filed herein can cover the order of the court as found on page 14 of the printed record and nothing else. The trustees do not believe it was the intention of the bankruptcy act to allow questions of fact in controversies and litigation to be heard in the appellate court without the evidence, and that it was never intended by the bankruptcy act to go behind and beyond the court below by means of any petition to revise.

There is nothing in the law that directs the court of appeals to revise the proceedings of a special master upon a petition to revise, and although the printed record contains the findings of a special master, yet these findings appear to be no part of the record. The act says the proceedings of the court can be revised or superintended upon a petition to revise; and there is nothing in the record upon which the order or decree of the court below can be criticised. The proceedings of the court below are given on page 14 of the printed record, and the proceedings, that is the decree, show the petition of Howard D. Thomas Company was denied.

No findings of fact or conclusions of law of the court below can be found in the record. There is no inherent defect in the order or decree sought to be revised. If the petitioner had appealed it could have brought the entire controversy up for hearing. It is a plenary suit, to use the language of the author-

ities, yet the petitioner is endeavoring to use a petition to revise under section 24b, which limits the jurisdiction of the appellate court to the acts of the court below, the only act in this case being the order or decree on page 14 of the printed record.

Findings of fact and conclusions of law in an appeal are not necessary, this being a real controversy, plenary suit, or litigation in bankruptcy proceedings on an appeal and no findings are required, but the testimony and exhibits are taken up and the upper court on apeal decides the case *de novo.*

In *Houghton v. Burton,* 228 U. S. 165, 57 L. Ed. 782, *supra,* decided in 1913, the court says:

> "Being an appeal from a decree in a controversy arising in a bankruptcy proceeding, and therefore, an appeal under section 24a, and not under section 25b, general order 36, made under the latter section, and requiring a finding of facts, has no application, and the appeal opens up the whole case as in other equity cases. *Hewit v. Berlin Mach. Works, supra; Coder v. Arts,* 213 U. S. 223, 53 L. Ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008, and *Knapp v. Milwaukee Trust Co., supra.*"

IN ANSWER TO PETITIONER'S BRIEF.

The petitioners' brief omits the findings of fact set forth by the special master under the heading "Conclusions of Law," on page 11 of the printed record, wherein the special master finds that the petitioner was advised at the time it presented its claim in bankruptcy.

The petitioner seems to base its entire case on this point, as indicated on page 23 of its brief, where it is set forth "that in order to constitute an election, the affirmation must be with knowledge of the essential facts." This from the petitioner's brief.

The fact of knowledge being established the special master held that the petitioner had elected "between their remedies and elected to become a creditor." This finding of the special master would seem to dispose of both the two subdivisions of petitioner's argument. It is immaterial whether it had or had not the right to rescind. With knowledge of the facts it elected to claim payment for goods sold. When petitioner discovered that this was going to involve a question as to the goods it had already taken, it withdrew its claim. It then petitioned "for reclamation" of the goods already treated as sold.

In the case of *Francis v. Bohart,* 147 Pacific, 756, the Supreme Court of Oregon, through Mr. Justice Burnett, says:

> "Indeed the weight of authority is to the effect that the commencement of any litigation which depends upon the hypothesis that the title has passed to the purchaser on waiver by the seller constitutes an election which the plaintiff cannot afterwards revoke. In *Hickman v. Richburg,* 122 Ala. 638, 26 South. 136, the plaintiff has contracted to sell lumber to the defendant, reserving the title until the price was paid. It was held that the unsuccessful attempt of the plaintiff to establish a lien upon the structure in which the lumber was used constituted a

waiver of the reservation of title, and that it was an election which barred the attempt to recover the identical property or damages for its conversion. In *Butler v. Dodson,* 78 Ark. 569, 94 S. W. 703, it was decided that bringing an action for the selling price is a waiver of the reservation of title. To the same effect are *Smith v. Barber,* 153 Ind. 322, 53 N. E. 1014; *Alden v. Dyer,* 92 Minn. 134, 99 N. W. 784; *Orcutt v. Rickenbrodt,* 42 App. Div. 238, 59 N. Y. Supp. 1008; *Fredrickson v. Schmittroth,* 77 Neb. 724, 112 N. W. 564; *Mathews Piano Co. v. Markle,* 86 Neb. 123, 124 N. W. 1129; *Sioux Falls Adjustment Co. v. Aikens,* 32 S. D. 154, 142 N. W. 651; *North Robinson Dean Co. v. Strong,* 25 Idaho, 721, 139 Pacific, 847; *Chase v. Kelly,* 125 Minn. 317, 146 N. W. 1113; *Purdy v. Dunn Machinery Co.* (Ga.), 82 S. E. 888; *Frisch v. Wells,* 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144. In commencing his action for the purchase price of part of the property, the plaintiff adopted the alternative of suing for the price instead of resuming the custody of the property by replevin or recovering damages in trover for its conversion. The contract being single there was a breach of the whole agreement giving rise to but one cause of action for the price. Having proceeded on the plan of recovering the sum stipulated to be paid under the contract for the sale of the property, the judgment rendered in that action is conclusive upon both parties, not only for what was actually litigated, but as to every other matter which the parties might have litigated and settled as incident to and necessarily connected with the subject-matter of the

litigation. *White v. Ladd,* 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732; *Colgan v. Farmers' and Mechanics' Bank,* 69 Ore. 357, 138 Pac. 1070. Having a grievance against his adversary, a party cannot submit him to the slow torture of multiplied litigation, when the whole matter can be settled in one action or suit. In other words, possessing but a single cause of action, he may not split it up to be used as materials for several actions. *Indiana B. & W. Ry. v. Koons,* 105 Ind. 507, 5 N. E. 549; *Wilson v. Buell,* 117 Ind. 315, 20 N. E. 231; *Willoughy v. Atkinson Furniture Co.,* 96 Me. 372, 52 Atl. 756; *Mallory v. Dawson, etc. Co.,* 32 Tex. Civ. App. 294, 74 S. W. 593.

"In short, the prosecution of the action for the purchase price of part of the property was an irrevocable election to proceed upon the postulate that the title to the property had passed to the purchaser named in the contract. Having entered upon that course, the plaintiff was bound to pursue it consistently to the end. He cannot shift his position and afterwards undertake to recover in specie the property which was the subject of the contract. It having been possible to sue for the whole purchase price, it was his duty to have done so, if he chose to take that remedy at all, and he must be held to have accepted the results of that judgment as a determination of all his rights under the contract. The facts recited appeared without dispute from the pleadings and evidence offered at the trial, and it was the duty of the court to sustain the motion made by the defendant for a verdict in his favor at the close of all the evidence, for,

> under the authorities cited, the action of the plaintiff in suing for the price, even of a part of the property, was a waiver of the title, which, having passed from him, he cannot recover possession of the chattels involved. Many other errors are assigned which, in the view we have taken of the case, are unnecessary to be considered. The judgment is reversed."

It can be seen that the petition to revise in this court on page 15 of the printed record, prays certain relief based upon certain statements included in paragraphs one and two of the prayer of the said petition. Said paragraphs one and two, purporting to set forth facts found by the special master and the court below, we submit are argumentative deductions from the findings of fact. The alleged facts in said paragraphs one and two on page 15 in the prayer of the petition cannot be seen in the findings of the referee or master. Moreover, in the answer of the trustees to the petition in this court these paragraphs one and two are specifically denied.

No error can possibly be claimed by the petitioner, other than that the order of the court below was erroneous in matter of law. Such error is predicated upon the said alleged facts in said paragraphs one and two of the petition herein, which paragraphs, as we have before indicated, are conclusions of the petitioner, rather than findings by the master or the court below. In short, we submit that the petitioner is attempting to present to this court by a petition to revise an assumed condition of facts set forth in the prayer of said petition.

As to paragraph one on page 15, we are unable to discover this paragraph in the findings of the referee. The referee says, on page 7: "These negotiations had progressed far enough, as I believe, to induce the officers of the bankrupt generally to believe that the bank intended to and would in a very short time supply it with one hundred thousand dollars, or so much thereof as was necessary to discharge its current merchandise obligations. Indeed, I believe some of the money had already been advanced for this purpose." Which is far from being the situation described by the petitioner herein, to-wit, that the Howard D. Thomas Company had been induced by misstatements made "as" of his own knowledge by the president of the bankrupt concern, which allegation is an allegation of fraud.

The facts further are shown that the petitioner was notified of conditions by Gevurtz, sent a man to Portland, learned of the impending bankruptcy, received back all the rugs there were, and now holds the same.

Also in the original petition, paragraph six, on page four of the printed record, it is alleged, that the "claim in bankruptcy was filed without knowledge at said time of the falsity of the representations hereinbefore referred to." We submit, the findings of fact, beyond which we cannot possibly go, are that there was no fraud, and that the claim was filed with full knowledge of the facts, and with full knowledge of the so-called falsity of the representations.

With regard to paragraph two on page 15 of the printed record, in the prayer of the Petition to Revise, there is clearly another erroneous assumption of fact, to-wit, the said paragraph sets forth that "inasmuch as the so-called election was not made with full knowledge of fact." This has been heretofore referred to, and must have been an oversight on the part of the petitioner, because the findings are that the petitioner's representative came to Portland, talked with Gevurtz, learned the situation, took back the rugs, and kept them, as above stated. Respondents emphasize this, as this is one of the main claims of the petitioner.

Petitioner bases its right to rescind upon the fact that the claim was filed in ignorance of the facts; yet the only fact that the court can possibly consider, if the court can consider any facts, are the facts in the report of the special master, to the effect that the petitioner had knowledge when he filed his bankruptcy claim. To demonstrate this, I. Gevurtz & Sons' bankruptcy petition was not filed and they had not been adjudicated bankrupt when the petitioner's representative came to Portland and took back his rugs and had his talk with Gevurtz, when Gevurtz told him he was going into bankruptcy. Therefore, the petitioner knew before it filed its claim in bankruptcy all the facts.

Therefore, instead of the election having been made without full knowledge of the facts, on the contrary, before this court on the Petition to Revise, the election was made with full knowledge of the facts.

The referee says, "Knowing all these circumstances and being bound to take them into consideration, it does not seem to me that they were not advised of the alleged false representations of Gevurtz at the time they filed their claim before the referee, and that in so doing they elected between their remedies and asked to become a creditor."

The petitioner likewise complains that Thomas & Company were cheated, and this is a prominent feature in its argument. Yet this is not so and is not substantiated. If the evidence and exhibits were at hand no such claim would be made by petitioner; but even on the incomplete record before this court it can be seen that Thomas & Company were not cheated. The petitioner complains that the attitude of the court below was that of the bankrupt as against a creditor, and in so complaining overlooks the fact that the trustees represent all the creditors, and that this is not a controversy between the bankrupt and Thomas & Company, but is a controversy between Thomas & Company and the other creditors who are represented by the trustees. That this is not a controversy between the bankrupt and Thomas & Company is shown by the fact that Thomas & Company and the bankrupt are represented by the same counsel (Printed Record, page 28). If there was a controversy between the bankrupt and Thomas & Company they could not be represented by the same counsel. And in view of the findings of the referee to the contrary, the petitioner's declaration that it has been cheated seems to be immaterial.

*Page Twenty—*

The respondents submit that this controversy cannot be heard in the Appellate Court on a Petition to Revise, and in any event there is nothing that this Honorable Court can or should revise or superintend, as shown by the record herein.

Respectfully submitted,

SANDERSON REED,
C. A. BELL,
Solicitors for Respondents.